

RECEIVED

AUG 12 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re

| | | |
|--------------------------------|---|----------------------|
| Amendment of Section 73.202(b) |) | |
| Table of Assignments |) | MM Docket No. 96-171 |
| FM Broadcast Stations |) | RM-8846 |
| Indian Springs, Nevada |) | |
| Mountain Pass, California, |) | |
| Kingman, Arizona and |) | |
| St. George, Utah |) | |

To: Chief, Allocations Branch

DOCKET FILE COPY ORIGINAL

COMMENTS ON COUNTERPROPOSAL

Claire B. Benezra, by her attorney, respectfully comments on the counterproposal of KHWY (California) L.P., licensee of FM station KHYZ, Mountain Pass, California, ("KHYZ") in the above-captioned proceeding. The Commission's public notice of this counterproposal, released July 28, 1997, stated that comments could be made within 15 days thereafter. Accordingly, these comments are timely.

Benezra proposes to upgrade her station, KPXC, from Channel 257A to Channel 257C. In her petition for rulemaking, filed June 28, 1996, she demonstrated that, from her proposed reference site, she would serve a white area of 8,647 sq. km containing 1,549 people, including 58 km of white area along Rt. 95.

Benezra's proposal requires that three existing stations, KSGI, KHYZ and KGMN-FM, each move one channel from their present frequencies. She obtained the consent of the licensee of FM station KSGI to changing its channel. Thus, her proposal falls within the Commission's policy of requiring up to two stations to

OLY

change frequency without their voluntary acquiescence.

On October 7, 1996, Brawley Broadcasting Company ("Brawley"), licensee of FM station KMXX, Imperial, California, filed comments supporting Benezra's petition. Brawley noted that it could upgrade its station to Class B1 once KHYZ changes its frequency as proposed by Benezra.

KHYZ submitted a counterproposal to Benezra's proposal, arguing that it should not have to change its frequency.¹ While it asserts in the body of its counterproposal that its concern is disruption to its listeners by having to tune to a different frequency, that is clearly only part of its difficulty. KHYZ' engineering statement attached to its counterproposal states that it "believes the proposed high powered operation of KPXC(FM) on a frequency only 2 channels removed from the proposed KHYZ(FM) channel presents a potential of harmful interference to its listenable signal." This matter is of no moment to the Commission, for the Commission looks only to the spacings specified in the rules. Benezra's proposal fully complies with all Commission spacing requirements. There is no validity to KHYZ' allegation of potential interference to KHYZ' signal from Benezra's station.²

¹ New West Broadcasting Systems, Inc., licensee of Station KGMN-FM, filed comments echoing, and incorporating by reference, those of KHYZ. It, too, objects to changing frequency. As New West offered nothing different than KHYZ, it will not be discussed further.

² As a real-life demonstration that KHYZ' interference concerns are meaningless, one need only look to Las Vegas, Nevada, where two successful high power FM stations, KQOL, Boulder City and KVBC-FM, Las Vegas, operate successfully despite being only two channels apart.

With regard to KHYZ' objection, it is instructive that nowhere does KHYZ grant that it is being asked to move only one channel, the least disruptive of all frequency moves. By its own admission, KHYZ' raison d'etre is to serve highway travelers who merely pass through its service area. It is unlikely that such listeners would have push buttons set to KHYZ's frequency, as KHYZ would not be a regular station for such people; they would tune manually to KHYZ when they enter its service area. With appropriate notification, travelers on Interstate 15 could tune to 99.3 MHz as easily as they now tune to 99.5 MHz.

Contrary to KHYZ's assertions, moving this one channel, as Benezra proposes, would cause it minimal difficulties. No other changes to KHYZ would be required. Its coverage would not change. KHYZ offers no proof that changing its frequency to accommodate Benezra's proposal would disrupt any listener. KHYZ has not cited any precedent in which the Commission has refused to order a station to change its frequency because of listener inconvenience. Its concern cannot be classified as anything more than pure speculation. As stated in her petition, Benezra agrees to compensate KHYZ for all reasonable costs associated with its change in frequency. This would include the costs of altering billboards and other signs to inform the public of KHYZ' new frequency.

The Commission must recognize that KHYZ's counterproposal is not for a new station, nor for an upgrade to an existing station. The sole purpose behind its filing is to avoid changing its frequency by even one channel. To accomplish its goal, recognizing

that Benezra's proposal to upgrade her station has significant merit, KHYZ requests the Commission to upgrade Benezra's station to Class C on a frequency other than the one she specified, Channel 272C or alternatively 276C. Use of an alternate channel at Indian Springs would require a substantially different transmitter site, and markedly different coverage area, from the one proposed by Benezra in her petition. KHYZ states that should Benezra's station change to Channel 272C or 276C, other stations, including itself, would not have to change frequency.

KHYZ identified the permissible area for a transmitter site for Channel 272C for Indian Springs. It selected one particular location within that area from which to compute coverage information. KHYZ has not demonstrated, nor attempted to demonstrate, that its proposed reference site is available and suitable. It merely showed that the site meets the Commission's requirements for city-grade coverage of Indian Springs, and conforms with the Commission's spacing requirements. The site is, however, at the minimum permitted distance from KFMS-FM, Las Vegas, severely limiting any move in a southeasterly direction.

KHYZ asserts that its proposal for Benezra would better serve the public interest because more white area and population would be served. Comparing the theoretical coverage its selected site with that from Benezra's site, KHYZ asserts that 6,185 sq. km more white area (14,832 sq. km vs 8,647 sq. km) containing 1,644 more people (3,193 vs 1,549), would be served from its proposed site. Such a comparison may be appropriate when the Commission is faced with

deciding between competing proposals put forth by competing petitioners. When petitioners select transmitter sites for their own use, the Commission may reasonably use these sites in comparing coverage for the purpose of determining which proposal will better serve the public interest.

However, this is not the case here. KHYZ does not propose to operate a station from its proposed site. It is asking the Commission to compare Benezra's coverage from her specified site with coverage from a site about which she knows nothing, and which KHYZ does not describe, other than to provide its coordinates. The undersigned is aware of no case in which the Commission has considered a counterproposal by one who does not intend to apply for the facilities described. Moreover, the Commission has never imposed a requirement that an applicant specify a particular transmitter site, or even cover white area, even when the potential coverage of white area was the basis for the allotment. For these reasons, there is absolutely no assurance that KHYZ' coverage claims are at all realistic. The Commission must not base its decision in this case on such hypothetical comparisons.

While, accordingly to KHYZ, there appears to be a large area for a transmitter site for Channel 272C based upon city-grade and spacing considerations, a number of areas, including the Nevada Test Site, Nellis Air Force Range, the Ash Meadows National Wildlife Refuge, and the Desert National Wildlife Range are excluded as possible sites. See the attached engineering statement of Cynthia M. Jacobson. Moreover, the need to have line-of-sight

from the transmitter site to Indian Springs further limits the theoretically available area. As a result of the various restrictions, the available transmitter site for Channel 272C would be limited to an area comprising 264 sq. km.

Moreover, Benezra is aware that at least two expressions of interest in Channel 272C at Indian Springs have been filed with the Commission. The Commission may thus be assured that the white area described by KHYZ will be served by a station on Channel 272C without forcing Benezra to move her station to a frequency and transmitter site of no interest to her.

Jacobson's engineering statement provides additional support for granting Benezra's proposal over that of KHYZ. Jacobson has determined the population which would gain service from grant of both proposals, assuming arguendo, that it is appropriate to compare Benezra's proposed coverage with that obtained from KHYZ' selected site. For Benezra, Jacobson considers both her proposal standing alone, and together with the proposed modification of Station KMXX, as proposed by Brawley Broadcasting Company in timely-filed comments. KMXX' upgrade is dependent on KHYZ changing frequency and could not occur without it.

In computing the respective coverage of the two proposals, Jacobson kept in mind the Commission's policy as enunciated in FM Broadcast Allotments (Greenup, Kentucky), 4 FCC Rcd 3843 (MM Bur. 1989). There, the Commission stated that it would assume facilities of 100kW at 300m HAAT for Class C allotments. It is noted that KHYZ used maximum Class C facilities of 600m HAAT, which is

clearly inappropriate.

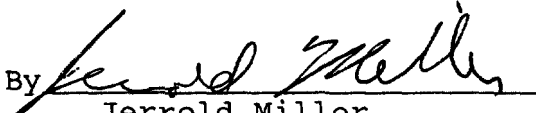
However, both transmitter sites are above 300m HAAT; hence use of that height makes no sense. Jacobson, rather, has assumed an antenna height of 30 meters above ground for purposes of her coverage calculations. She demonstrates that a Class C station on Channel 272 from KHYZ' assumed site would provide service to only 10,393 people. In contrast, Benezra would provide service to 635,134 people, a difference of 624,741!

When KMXX' upgrade is considered, an additional 637,747 people will receive service over that proposed by KHYZ. The markedly large difference in population to be served, and concomitant increase in efficient use of the broadcast spectrum, clearly demonstrates that the public interest will be best served by grant of Benezra's proposal.

Accordingly, for all the reasons discussed above, Benezra's proposal more serves the public interest and should be adopted. The Commission should amend Section 73.202(b) as proposed in the NPRM.

Respectfully Submitted,

CLAIRE B. BENEZRA

By 
Jerrold Miller
Her Attorney

August 12, 1997

Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033

**STATEMENT OF CYNTHIA M. JACOBSON
IN SUPPORT OF REPLY COMMENTS IN THE
MATTER OF A COUNTERPROPOSAL (RM-9145)
IN MM DOCKET NO. 96-171 (RM-8846)**

Prepared for: Claire B. Benezra

I am a Consulting Radio Engineer, an employee in the firm of Carl T. Jones Corporation with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission. I am a Registered Professional Engineer in the Commonwealth of Virginia, Registration No. 027914.

This statement and associated exhibits have been prepared for Claire B. Benezra in support of Reply Comments in opposition to a Counterproposal (RM-9145) in MM Docket No. 96-171.

BACKGROUND

On June 28, 1996 Claire B. Benezra ("Benezra"), permittee of FM station KPXC, Indian Springs, Nevada, filed a Petition for Rulemaking requesting substitution of Channel 257C for Channel 257A at Indian Springs and modification of Station KPXC's construction permit to specify the higher class channel. To implement this change, Benezra also proposed the substitution of Channel 259B for Channel 258B at Mountain Pass, California;

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 2

the substitution of Channel 260C for Channel 259C at St. George, Utah and the substitution of Channel 261C2 for Channel 260C2 at Kingman, Arizona.

On August 9, 1996, the Commission adopted a Notice of Proposed Rulemaking and Orders to Show Cause, MM Docket No. 96-171, released August 16, 1996. Comments were due on or before October 7, 1996. On October 7, 1996, KHWY (California), L.P. ("KHWY"), licensee of station KHYZ(FM), Mountain Pass, California filed a counterproposal in the instant proceeding requesting substitution of Channel 272C¹ to Indian Springs, Nevada, in lieu of Channel 257C.

Also, on October 7, 1996, Brawley Broadcasting Company, licensee of FM station KMXX, Imperial, California ("KMXX"), filed comments in support of the Commission's Notice of Proposed Rulemaking and Orders to Show Cause, MM Docket No. 96-171, released August 16, 1996². KMXX has advanced two additional facility channel changes which conflict with the KHWY counter proposal but are compatible with Benezra's Petition to Amend the FM Table of Allotments. KMXX proposes the following:

| <u>CITY</u> | <u>DELETE</u> | <u>CHANNEL</u> <u>ADD</u> |
|--------------------|---------------|------------------------------|
| Indian Springs, NV | 257A | 257C * |

¹ Alternatively, KHWY proposes an additional channel - 276C - which can be allotted to Indian Springs.

² An erratum to the October 7, 1996 comments was filed on October 28, 1996, stating that the KMXX upgraded allotment would be fully-spaced at its application site coordinates, rather than the licensed site coordinates which were inadvertently referenced.

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 3

| | | |
|-------------------|-------|---------|
| Mountain Pass, CA | 258B | 259B * |
| Kingman, AZ | 260C2 | 261C2 * |
| St. George, UT | 259C | 260C * |
| Imperial, CA | 257A | 257B1 |
| Parker, AZ | 257C2 | 258C2 |

* Changes proposed in MM Docket No. 96-171.

Consequently, KMXX's proposal is mutually exclusive with the counterproposal of KHWY.

PUBLIC BENEFIT GAIN

The proposed channel changes as advanced by Claire B. Benezra and those advanced by the mutually exclusive proposal of KMXX are superior in the number of persons to benefit. Tabulated below is a comparison of persons served within the 60 dBu contour of the KHWY proposal versus the Benezra/KMXX proposal. The 60 dBu contour for all stations except Imperial, California³, were calculated every 5 degrees of azimuth to account for rugged terrain. For both the Benezra proposal and KMXX proposal, an antenna centerline height of 30 meters above ground level was assumed. From the reference coordinates of KMXX for the Channel 272C (or Channel 276C), maximum Class C facilities of 600 M HAAT would require a tower structure greater than 260 meters (853

³ The 60 dBu contour was calculated every 10 degrees of azimuth for Imperial, California due to bad data segments within the terrain database.

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 4

feet) above ground. This is consistent with FCC policy outlined in *Greenup, Kentucky and Athens, Ohio ("Greenup")*, 4 FCC Rcd. 3843.

| | KHWY Proposal | Benezra Proposal | Benezra/KMXX Proposal |
|--|------------------|---------------------|--------------------------|
| Indian Springs, NV Ch. 257C | ----- | 635,134 | 635,134 |
| Indian Springs, NV Ch. 272C or Ch. 276C | 10,393 | ----- | ----- |
| Mountain Pass, CA Ch. 258B | 8,646 | ----- | ----- |
| Mountain Pass, CA Ch. 259B | ----- | 8,646 | 8,646 |
| Kingman, AZ Ch. 260C2 | 30,407 | ----- | ----- |
| Kingman, AZ Ch. 261C2 | ----- | 30,407 | 30,407 |
| St. George, UT Ch. 259C | 70,872 | ----- | ----- |
| St. George, UT Ch. 260C | ----- | 70,872 | 70,872 |
| Imperial, CA Ch. 257A (App) | 88,851 | 88,851 | ----- |
| Imperial, CA Ch. 257B1 | ----- | ----- | 101,857 |
| Parker, AZ Ch. 257C2 | 38,967 | 38,967 | ----- |
| Parker, AZ Ch. 258C2 | ----- | ----- | 38,967 |
| Total Number of Persons | 248,136 | 872,877 | 885,883 |
| Net Gain | ----- | 624,741 | 637,747 |

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 5

The table clearly demonstrates that an additional 624,741 persons will receive service from the Benezra proposal versus the KHWY proposal. Similarly, an additional 637,747 persons will receive service from the Benezra/KMXX proposal versus the KHWY proposal. This number would be greater if indeed Parker, AZ pursued an upgrade to a Class C1 on Channel 258 as was noted to be feasible in the KMXX proposal.

With regards to the area to be served, not now receiving service, i.e., "white area," KHWY has tabulated an additional 1,644 persons⁴ served from the Channel 272C reference site assuming maximum Class C facilities. This small number of persons is far outweighed by the additional 624,741 persons that would benefit from the Benezra proposal and 637,747 persons receiving additional service from the Benezra/KMXX proposal.

PERMISSIBLE SITE AREAS

Attached as Exhibit 1 is the permissible site area for a Channel 257C allotment at Indian Springs, Nevada. Of this large area, tower construction is prohibited in the Nevada Test Site, Nellis Air Force Range and the Desert National Wildlife Range. This results in a possible tower site located to the south and west of Indian Springs of approximately 1,437 square kilometers. Line-of-sight restraints eliminate any candidate site located due west of Spring Mountains and also eliminates candidate sites located in the far eastern portion, thus resulting in a practical permissible site area of 992 square kilometers.

⁴ The total white area proposed to be served by the Benezra proposal is 8,647 square kilometers with a population of 1,549 persons.

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 6

The permissible site area for the Channel 272C allotment can be seen in Exhibit 2. Not only are the Nevada Test Site, Nellis Air Force Range and the Desert National Wildlife Range excluded as potential tower sites, but also excluded is the Ash Meadows National Wildlife Refuge ("Ash Meadows"). Since the refuge was not established until mid-1984, the boundaries are not depicted on U.S.G.S. maps of earlier date. From maps obtained from the U.S. Fish and Wildlife Service, these boundaries were transferred to Exhibits 1-3. Based on the above excluded areas, the permissible site area is reduced to 1,193 square kilometers⁵. Line-of-sight considerations further limit potential sites, specifically locations west of the Spring Mountains, that do not have line of site into Indian Springs. Therefore, the practical permissible site area for the Channel 272C allotment proposal is only 264 square kilometers.

The permissible site area for Channel 276C proposed allotment is further reduced to a total area of 482 square kilometers, taking into the excluded areas cited above, see Exhibit 3. Approximately half of this area is located due west of the Spring Mountains and would not have line-of-sight into Indian Springs. The resulting practical permissible site area would be only 218 square kilometers.

It is a well established Commission policy to allot channels with the least site restriction possible; thereby providing greater flexibility in selecting transmitter sites.⁶ As

⁵ This figure is based on the exclusion of the Ash Meadows National Wildlife Refuge (102 square kilometers) as a potential tower site.

⁶ See Vacaville, CA, 4 FCC Rcd 8315 (1989), recon den., 6 FCC Rcd 143 (1991).

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 7

proposed by Benezra, the Channel 257 reference site is 21.2 kilometers southwest of Indian Springs. The proposed reference site for KHWY's proposal of Channel 272C (or 276C) is located 30 kilometers west of Indian Springs. Allotment of Channel 272C (or 276C) results in a much greater site restriction than the proposed Channel 257C allotment, as well as a substantially reduced possible site area for selection of an antenna site. The site restriction required to accommodate Channel 272C or 276C is inefficient use of the spectrum compared to the lesser site restriction for Channel 257C.

Not only does the proposal of KHWY greatly reduce the flexibility of Benezra to secure a transmitter site, but KHWY proposes to reduce the potential population coverage as the Channel 272C (or 276C) permissible site areas lie within more sparsely populated areas. Further, much of the area lies within protected land areas and would not have line-of-sight into Indian Springs. The total practical permissible site area is reduced by 73% with the proposal of Channel 272C by KHWY.

SUMMARY

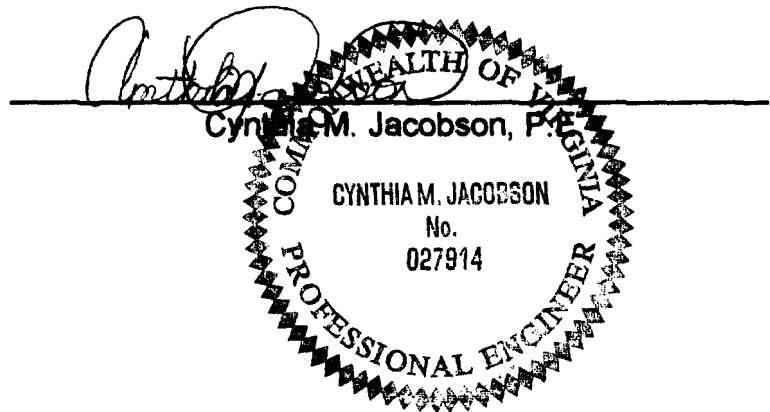
The FM coverage contours depicted herein were predicted in the manner prescribed by Section 73.313 of the FCC Rules. The population data was derived from a computer program using the 1990 U.S. Census of Population and pertinent contours. The land area data was determined using a polar planimeter.

STATEMENT OF CYNTHIA M. JACOBSON
PAGE 8

The Benezra rulemaking for a Channel 257C facility at Indian Springs would extend 60 dBu service to an additional 624,741 persons⁷ more than KHWY's counterproposal. The Benezra proposal of Channel 257C results in a permissible site area consisting of 992 square kilometers versus KHWY's proposal of Channel 272C or Channel 276C which yields 264 square kilometers and 218 square kilometers, respectively.

This statement and attached exhibits were prepared by me or under my direct supervision and are believed to be true and correct.

DATED: August 11, 1997



⁷ This figure would be an additional 637,747 persons with the Benezra/KMXX proposal.

EXHIBIT 3

DESERT NATIONAL
WILDLIFE RANGE

NELLIS
AIR FORCE
RANGE

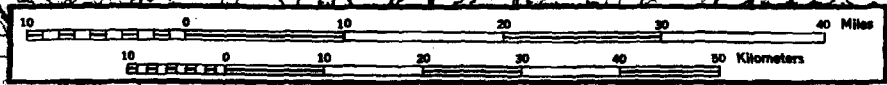
NEVADA
TEST SITE

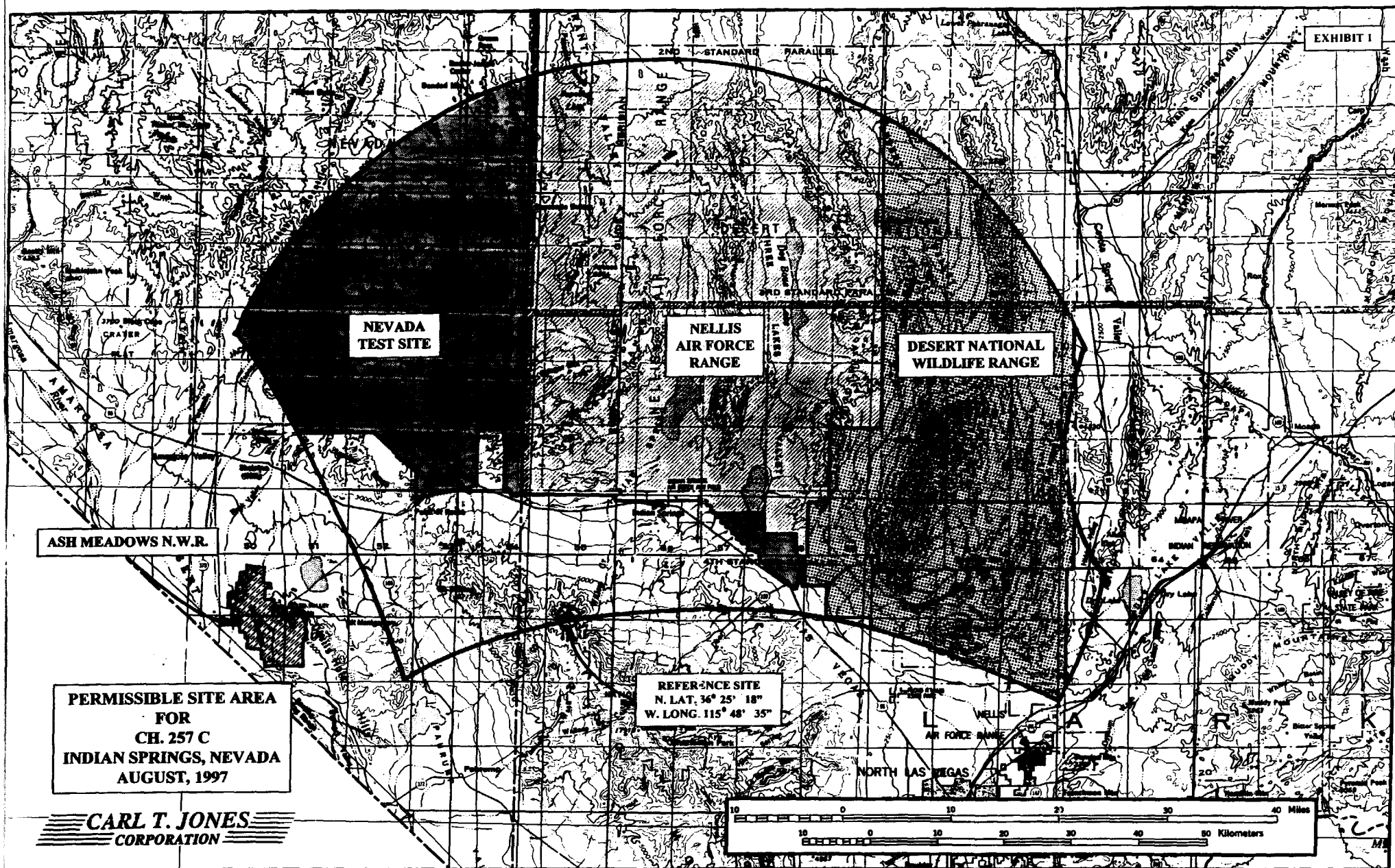
REFERENCE SITE
N. LAT. 36° 31' 00"
W. LONG. 115° 59' 35"

ASH MEADOWS N.W.R.

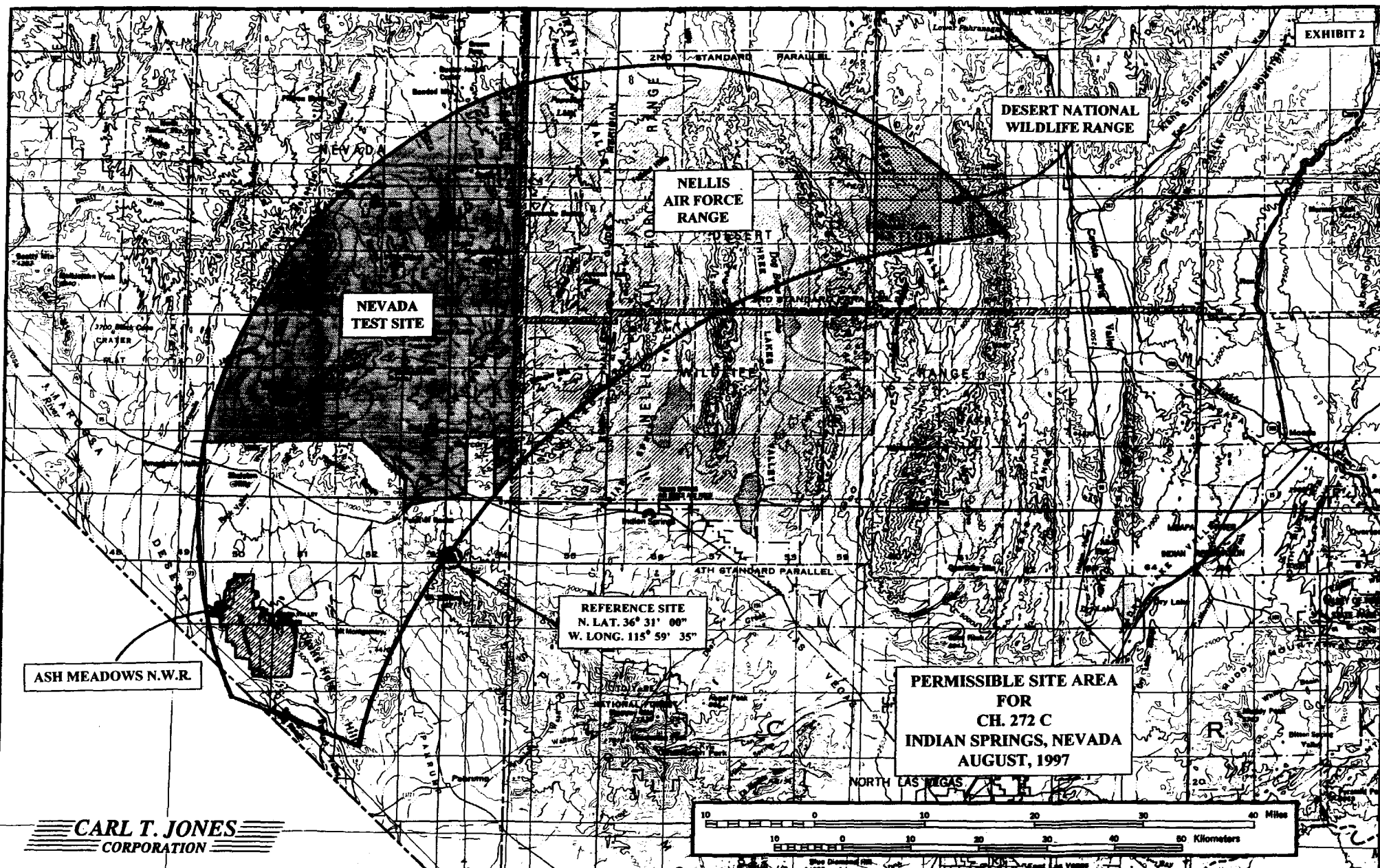
PERMISSIBLE SITE AREA
FOR
CH. 276 C
INDIAN SPRINGS, NEVADA
AUGUST, 1997

CARL T. JONES
CORPORATION

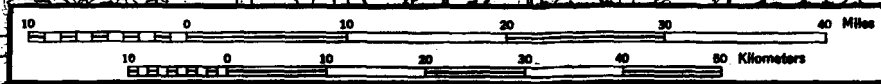




CARL T. JONES
CORPORATION



CARL T. JONES
CORPORATION



CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of August, 1977, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

Bruce A. Eisen, Esquire
Kaye, Scholer, Fierman, Hays & Handler, LLP
901 15th Street, N.W.
Washington, D.C. 20005-2327

Henry E. Crawford, Esquire
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

Marissa Repp, Esquire
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, D.C. 20004

Mark N. Lipp, Esq.
Ginsberg Feldman & Bress
1250 Connecticut Ave. NW
Washington, DC 20036-2603

